HCJ 5167/00

1 Professor Hillel Weiss, Esq.
2. Moshe Feiglin, Chairman of 'Zoh Artzeinu' Organization

v.

1. Prime Minister of Israel
2. Government of Israel
3. Israeli Knesset

HCJ 9607/00

1. Yoram Sheftel, Esq.
2. Doron Beckerman, Esq.

v.

1. Ehud Barak, Prime Minister of Israel
2. Government of Israel
3. Elyakim Rubenstein, Attorney General

HCJ 84/01

1. Akiva Nof
2. Dov Shilansky
3. Dr. Yosef Faber
4. Yehiel Hazan
5. Esther Shternberger

v.

1. Ehud Barak in his Capacity as Prime Minister of Israel
2. Government of Israel

HCJ 86/01

1. Gabi Butbul
2. Yossi Ben Shahar

v.

1. Prime Minister and Minister of Defense – Ehud Barak
2. Government of Israel
3. The Attorney General – Elyakim Rubenstein

HCJ 147/01

1. Yaakov Elias

v.

1. Prime Minister, Ehud Barak
2. Government of Israel

Formal Respondents

1. The Attorney General – Elyakim Rubenstein
2. Professor Daniel Friedman
3. Professor Shimon Shetreet

4. **Professor Shlomo Avineri**
5. **Moshe Negbi, Esq.**

The Supreme Court Sitting as the High Court of Justice
[January 25th, 2001]
Before President A. Barak, Vice President S. Levin, Justices T. Or, E. Mazza, I. Zamir, J. Türkel and I. Englard.

Petitions to the Supreme Court sitting as the High Court of Justice for an *order nisi* and an interlocutory order.

Facts: The Prime Minister resigned, and he and the Ministers of the outgoing government continued to fulfill their duties as prime minister and ministers until the new government was to take office. In this framework the outgoing government continued to conduct political negotiations with the Palestinian Authority with the aim of reaching an agreement before the elections.

Held: The majority opinion was written by President Barak. The petitioners claimed that the outgoing government was not authorized to conduct the political negotiation. They asked the court to direct the government to end the political negotiation until the establishment of a new government following the special elections. The basic issues that were addressed in this case were: what is the scope of the authority and discretion of an outgoing government? Is it permitted to conduct political negotiation and sign an agreement? And what is the scope of judicial review of decisions of the outgoing government?

The petitions were denied.

Vice-President S. Levin and Justice Zamir wrote separate opinions supporting the majority conclusion.

Justice Türkel wrote a dissenting opinion.

Basic laws cited;
Basic Law: Jerusalem, the Capital of Israel (Amendment).
Basic Law: the Government
Basic Law: the Knesset

Legislation cited:
Government and Justice Arrangements Law (Revocation of Application of the Law, Judiciary, and Administration) 5759-1999.
Local Authorities (Election of the Head of the Authority and his Deputies and their Term in Office) Law 5735-1975, s. 27a
Transition Law, 5709-1949, s. 1.

Israeli Supreme Court cases cited:
[1] HCJ 5/86 *SHAS Party Association of Sephardim Shomrei Torah in the Knesset v. Minister of Religions*, IsrSC 40(2)742.
[2] HCJ 4676/96 *Mitral Ltd. v. Knesset of Israel*, IsrSC 50(5) 15.

[3] HCJ 5621/96 *Herman – Head of the Municipality Ofakim v. the Minister of Religious Affairs*, IsrSC 51(5) 791.

[4] HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel and Others* IsrSC 51(3) 46.

[5] HCJ 2534/97, 2535/97, 2541/97 *MK Yahav and Others v. State Attorney and Others* IsrSC 51(3) 1.

[6] PPA 7440/97 PPA 6172/97 *State of Israel v. Golan* IsrSC 52(1)1

[7] HCJ 4354/92 *Temple Mount Faithful v. Prime Minister* IsrSC 57 (1)37.

[8] HCJ 6057/99 *MMT Mateh Mutkafei Terror v. Prime Minister* (unreported).

[9] HCJ 7307/98 *Polack v. Government of Israel* (unreported).

[10] HCJ 2455/94 '*Betzedek' Organization v. Government of Israel* (unreported).

[11] HCJ 4877/93 *Irgun Nifgai Terror v. Government of Israel* (unreported).

[12] HCJ 3125/98 *Abed Elaziz Muhammad Iyad v. IDF commander in Judea and Samaria* (not yet reported).

[13] HCJ 6924/00 *Shtenger v. Prime Minister* (not yet reported).

Israeli books cited:

[14] A. Rubinstein, *Constitutional Law in Israel* 536 (vol. 2. 4th Expanded Edition, 1991).

[15] Y. H. Klinghoffer *Selected Material in Matters of the Day* 1970-1979, 64, at 71 (1979).

[16] A. Rubenstein and B. Medinah, *Constitutional Law of the State of Israel*, 91 (vol. A. 5th edition (1996).

Israeli articles cited:

[17] Klein, 'The Powers of the Caretaker Government: Are they Really Unlimited?' 12 *Isr. L. Rev*. 271 (1977).

[18] Shetreet 'Custom in Public Law' *Klinghoffer Book on Public Law* (edited by I. Zamir) 375 (1993

[19] Shetreet, 'The Knesset's Role in Signing Treaties' Hapraklit 36 at 349 [19] S. Shetreet

Foreign books cited:

[20] T. Maunz, *G. D□rig Kommentar zum Grundgesetz (M□nchen).*

[21] J. Esensee, *P. Kirchhof Handbuch des Staatsrechts* (Heidelberg, Bd. II, 1987).

[22] G. Burdeau, F. Hamon, M. Troper *Droit Constitutionnel* (Paris, 26meʋ ed., 1999).

Foreign articles cited:

[23] Boston, Levine, McLeay, Roberts and Schmidt, 'Caretaker Government and the Evolution of Caretaker Convention in New Zealand', 28 *VUWLR* 629 (1998).

Jewish law sources cited:

[24] Proverbs 28:14

HCJ 5167/00

For petitioners – Dr. Chaim Misgav.; Howard Griff.

For respondent – Osnat Mendel.

HCJ 9607/00
For petitioners – Yoram Sheftel
For respondent–Osnat Mendel

HCJ 84/01
For petitioners – Akiva Nof
For respondent – Osnat Mendel

HCJ 86/01
For petitioners – Shmuel Lavi; Ran Shalish; Eiran Tzur
For respondent – Osnat Mendel

HCJ 147/01
For petitioners – Himself
For respondent – Osnat Mendel
For formal respondent no. 3 – Professor Shimon Shetreet

JUDGMENT

President Barak

The Prime Minister resigned. He and the Ministers of the outgoing government continue to fulfill their duties until the prime minister and ministers of the new government take office. In this framework the outgoing government is conducting negotiations for a political arrangement with the Palestinian Authority, with the aim of signing an agreement before the elections. What is the scope of the authority and what is breadth of the discretion of the outgoing government? Is it permitted to conduct the political negotiation and sign the agreement? What is the scope of the judicial review of the decisions of the outgoing government? These are the basic issues that have arisen before us in these petitions. These are weighty questions. In the normal course of events significant time is required for a judgment on such issues. Such significant amount of time is not at our disposal, as the passage of time will undermine the rationale at the foundation of the petitions. We have done all that we could to hear the petitioners arguments and to respond to them as speedily as possible. We now present our judgment. We have in all likelihood been brief where it would have been proper to expand. We have tried to do the maximum possible in the brief time that was at our disposal.

The petitions and the responses to them

1. The Government of Israel has been conducting negotiations for many months with the Palestinian Authority. The Attorney General has explained the characterization of this negotiation in a memo (dated December 12, 2000) which was given to the Prime Minister:

‘The agreement that is now being negotiated is different

> from all of its predecessors ever, in every direction, as to its challenge and risks. The challenge is ending the difficult conflict between Israel and the Palestinians, which all desire; the risk is the surgical operation, difficult beyond all difficulty, which the agreement demands.'

The negotiation and its content are a subject of sharp debate in Israel. Against this background – and against the background of other internal matters – the Prime Minister, Mr. Ehud Barak, resigned from his position as Prime Minister (in effect as of December 12, 2000). Special elections for Prime Minister were set for June 2, 2001. The political negotiation with the Palestinian Authority continues to be conducted even after the resignation of the Prime Minister. Against this background the petitions before us were submitted. The petitioners are citizens who claim that the outgoing government is not authorized to conduct the political negotiation it is conducting. They request that we direct the government to stop the political negotiation until the establishment of a new government after the special elections.

At the foundation of these petitions is the viewpoint that the outgoing government is a 'transitional government' whose authority is qualified, in the sense that it is entitled to deal only with ongoing matters. This qualification, according to the petitioners claim, stems from the interpretation of the Basic Law: The Government and constitutional custom. So too, this qualification is derived from the principle of reasonableness. In these contexts the Government and Justice Arrangements Law (Revocation of Application of the Law, Judiciary, and Administration) 5759-1999 and the Basic Law: Jerusalem the Capital of Israel (Amendment), which require, as said in them, Knesset decisions for any territorial changes, were mentioned. The outgoing government does not have a majority in the Knesset, and therefore could not fulfill these requirements. Even this narrows the authority of the outgoing government. This is primarily so, when the supervision by the Knesset – which is in recess – of the activities of the government, is not being implemented in actuality.

2. In its response (from January 4, 2001) the Attorney General notes that the constitutional principle is of 'continuity of government'. The interpretation of the Basic Law: the Government does not lead to the application of limits on the authority of the outgoing government. There is no basis to the claim as to the existence of a constitutional custom which limits the authority of such a government. However, exercise of powers during a period of elections requires great caution. The attorney general further added and noted that any agreement that would be reached, if it is reached, requires Knesset approval. Every government decision, according to which the law, judiciary, and administration of the State of Israel will no longer apply on an area where it applies today, requires Knesset approval with a majority vote. Every decision as to the transfer of powers in the area of Jerusalem to a foreign entity requires a basic law which is to be passed by a majority vote. In a supplementary response (from January 17, 2001) – which followed questions we asked during the course of the petitions – the attorney general added that 'the

measure of caution is not a new legal standard, just like reasonableness or proportionality'. In the opinion of the attorney general, 'a determination on the question whether the government undertook proper caution is found . . . in the public-parliamentary realm'. The attorney general further added in response to our questions that 'if an agreement is signed by the Prime Minister, in outline, or in another manner, its validation will be conditioned on the approval of the Government, and the required internal approvals, and this will be stated in the agreement itself. As is common as to such agreements, this agreement will also be brought for Knesset approval.'

The normative framework

3. With the resignation of the Prime Minister 'special elections will be held' (section 23(c) of the Basic Law: the Government). What are the powers of the Prime Minister and the ministers upon the resignation of the Prime Minister and approaching the special elections? Sections 31 and 32 of the Basic Law: Government address this:

> 'Continued Functioning of the Prime Minister and Ministers
>
> 31(a) A Prime Minister who has resigned or in whom the Knesset expressed no confidence will continue in office until the newly elected Prime Minister assumes office.
>
> (b) In the event of the Prime Minister's death, permanent incapacitation, resignation, removal from office, or an expression of no confidence by the Knesset, the Ministers will continue in office until the newly-elected Prime Minister assumes office.
>
> Continuity of Government
>
> 32. During the election period for the Knesset and the Prime Minister or during special elections, the Prime Minister and the ministers of the outgoing Knesset will continue in office until the Prime Minister and the ministers of the new Government assume office.'

Thus, the Basic Law: the Government establishes the principle of government continuity (section 32) 'governments rise and fall, but the government forever stands.'(HCJ 5/86 *SHAS Party Association of Sephardim Shomrei Torah in the Knesset v. Minister of Religions* [1] at p. 751; and compare: section 37 of the Basic Law: the Knesset and HCJ 4676/96 *Mitral Ltd. v. Knesset of Israel* [2]). The resigning Prime Minister continues in office until the newly elected prime minister assumes office. Upon his resignation, the ministers continue in office until the newly elected prime minister assumes office (section 31). At the foundation of this provision is the approach that with the resignation of the Prime Minister a governmental 'void' is not created, and the government continues to function which serves as the executive branch. The continuity and the stability are thereby ensured. And note: the act of resignation of the Prime Minister, restores, in fact, the confidence that was given him, to the decision of the people, who are sovereign. In this situation, he indeed continues to serve in office by authority of section 31 of the basic law, when the basis for his continuation in office is in the

law's provision. This is so, until the newly elected prime minister, who won the public's confidence in the special elections, assumes office.

4. Indeed, in the case before us the Prime Minister has resigned. He and the members of his cabinet continue to serve in office, by authority of section 31 (and 32) of the Basic Law: the Government. Is there a formal limitation on their authority? The answer is in the negative. There is nothing in the Basic Law: the Government which narrows the formal authority of the resigning prime minister and the formal authority of the ministers, to ongoing activities only. Justice M. Cheshin expressed this approach when noting:

> 'The world-of-law acts according to its way and the powers of operation exist, whether in the days between one election and another and whether during the days of the election. The authority of the government stands every day of the year and from year to year, so too regarding the powers of members of the cabinet.' (HCJ 5621/96 *Herman – Head of the Municipality Ofakim v. the Minister of Religious Affairs* [3] at p. 804.)

5. The petitioners have argued before us that indeed there is a limitation on the authority of the outgoing Prime Minister and government who continue in office after the special elections. This limitation limits the bounds of authority of the government only to the government's 'ongoing operations', and not to determination of matters of principle with far-reaching ramifications. Indeed, the claim of 'ongoing' operations of the government (expedition des affaires courantes) is not an innovation of the petitioners. This approach is common in a number of countries which have a parliamentary regime (see Klein, 'The Powers of the Caretaker Government: Are They Really Unlimited?'[17]; Boston, Levine, McLeay, Roberts and Schmidt, 'Caretaker Government and the Evolution of Caretaker Convention in New Zealand' [23]. This approach was examined in Israel by a public committee (Justice Z. Berinson (Chairperson), S.Z. Abramov, Dr. A. Ankorin, Professor B. Aktzin, Professor Y. Dror, Y. Zamir, and Dr. A. Yadin). This committee dealt with the scope of powers of a 'transitional government' (according to the prior Basic Law: the Government). It examined the adoption of the 'law of ongoing operations' and decided not to adopt it. In the committee's report it was written:

> 'The Committee weighed the question whether the powers of a transitional government are to be limited in any way. Such as: limitation of powers to ongoing matters or matters that cannot stand delay (similar to the law of ongoing matters which is accepted in France, Italy and Belgium and other European countries) or limiting its operations in specific areas, subject to Knesset approval, or limiting its power to present draft laws in fundamental matters that are in dispute. The Committee decided for reasons of practicality and in light of the special circumstances of the State, that reducing the functional areas in which a transitional government will be permitted to operate will

> cause too drastic a change from a regular government to a transitional government, will damage the proper functioning of the government and may damage vital activity of state institutions in the case of a sudden crisis. Abstract formulations such as 'ongoing matters' cannot promise the degree of certainty needed for proper constitutional functioning. In light of these rationales the Committee did not even see fit to recommend determining a period of time after which the transitional government would be limited in its powers or to recommend distinctions as to limitation of powers between different types of transitional governments' ('Report of the Committee on the Matter of Transitional Government', p. 6)

In relating to cases in which the government left office under the prior Basic Law: the Government, Professor Rubinstein writes:

> 'In all of these cases the outgoing government continues in it duties as usual. Section 25 of the Basic Law establishes that the President will begin the processes to put together a new government but 'the outgoing government will continue to fulfill its functions until the new government is established'. The law does not determine a time frame for such a government which does not have the Knesset's confidence. In popular language such a government is called a 'transitional government' and this term indeed is fitting to describe the interim situation between one government and another. In terms of its powers and role a transitional government is no different from a regular government which has the Knesset's confidence. An attempt has been made to give limited meaning to the term 'will continue in its functions', but it has failed. A similar arrangement is practiced in England, where the resigning government stays in office during the period of elections until establishment of the new government after the elections, however, there the period of transition is shorter.' (A. Rubinstein, *Constitutional Law in Israel* [14] 536).
>
> In relating to the continental doctrine as to the power of an outgoing government to deal only with ongoing matters, Professor Klinghoffer has noted that in Israel 'transitional governments have always seen themselves as permitted to exercise the full powers of a regular government, this position did not contradict explicit provisions in the written law' (Y. H. Klinghoffer, *Selected Material in Matters of the Day* [15] at 71. In relating to the nature of the continental doctrine as to ongoing powers of a transitional government, Professor Klinghoffer noted that: 'there is much doubt if abstract formulas such as these, founded on the term 'ongoing matters' can ensure the degree of certainty needed for sound constitutional life' (**Ibid**, p. 71).

6. Moreover: with the establishment of the Basic Law: the

President A. Barak

Government the Knesset decided to continue with the accepted practice, and refrained from making a formal change in the powers of the outgoing government. Against this background we are of the opinion that it not proper now, by way of construction, to bring in to Israel the continental doctrine as to limitation of the powers of the outgoing government (as to a similar approach in Germany see Herzog, Maunz-Durig, Grundgesetz Kommentar, Art 69 III 46, 60 [20]; Schroeder, Handbuch des Staatsrechts, 43 (Band II, par. 51) [21]). Of course the Knesset as an establishing authority may, after examining the issue as to all of its aspects, limit the powers of the outgoing government, if it sees fit (compare section 29(b) of the Basic Law: the Government as to the voiding of the powers of the acting prime minister to disperse the Knesset; compare also section 27a of the Local Authorities (Election of the Head of the Authority and his Deputies and their Term in Office) Law 5735-1975). On this matter various ideas have been proposed for legislation, such as subjecting the government – which no longer has the confidence of the Knesset – to Knesset decisions (see Klein, **Ibid**, [17] p. 285; Rubenstein, **Ibid**, [14] p. 502; Klinghoffer, **Ibid**, [15] p. 71).

7. It has been argued before us that there is a constitutional custom, according to which the outgoing government is limited to ongoing operations ('maintenance' operations) alone. So too it was argued, that there is a constitutional custom, according to which international treaties of special importance that Israel is party to require Knesset ratification. This constitutional custom, so it was argued, is not limited only to retroactive ratification by the Knesset but requires advance consent of the Knesset before the government signs them. We cannot accept these arguments. The question of the validity of constitutional custom in Israel has yet to be examined by this court. For myself, I am prepared to presume, without making a judicial determination on the matter, that constitutional custom is a legal source for creating binding constitutional law in Israel (See Shetreet 'Custom in Public Law' Klinghoffer Book on Public Law [18] 375; A. Rubenstein and B. Medinah, *Constitutional Law of the State of Israel* [16] at pp. 95-96. It will suffice for me to say, for purposes of the matter before us, that it has not been proven to us, in the accepted manner for the proving of (constitutional) customs, the existence of a constitutional custom according to which the outgoing government has only ongoing powers (or 'maintenance' powers). As to the ratification of international treaties of special importance, the government accepts (as per the Attorney General before us) that any agreement that will be made in this matter will be brought before the Knesset for ratification (see also Shetreet, 'the Knesset's Role in Signing Treaties' [19] at 349; Rubinstein, **Ibid**, **Ibid** [16]). The existence of a constitutional custom by which the consent of the Knesset must be given in advance, has not been proven to us.

8. From the above it can be seen that constitutional law in Israel does not recognize a special doctrine according to which with the resignation of the prime minister, his powers and the powers of the ministers – and for our matter we can say, the powers of the outgoing government – are limited to ongoing operations ('maintenance'

operations) alone. However, the outgoing government, like every government in Israel, must act with reasonableness and proportionality, when the difference between it and a regular government is expressed in the scope of the coverage of the test of reasonableness. Indeed, the principles of reasonableness and proportionality are general legal principles, which apply to the activities of every government, including an outgoing government. The 'range of reasonableness' which determines the range of operations beyond which the action of the government is not reasonable, also applies to the operations of an outgoing government. As is known, an outgoing government can be created in various forms (such as the resignation of the prime minister, expression of no-confidence in the prime minister by the Knesset, dispersal of the Knesset by the prime minister with the consent of the president, dissolution of the Knesset, and even a regular situation of a government that operates after timely elections). We are dealing in the petitions before us with one of the forms of an outgoing government, which is, resignation of the prime minister. The rest of the judgment is aimed at these circumstances.

9. What do principles of reasonableness and proportionality tell us about the activities of an outgoing government where the prime minister resigns? In answering this question we must return to the purpose at the core of the continuation in office of the prime minister and the ministers, despite the resignation of the prime minister. This purpose is twofold: **on the one hand** it is intended to prevent a governmental 'void' and ensure stability and continuity. **On the other hand**, the special status of the outgoing prime minister is to be taken into account, where ostensibly upon his resignation his role was meant to end, but he continues to fill it until the chosen prime minister enters office, and this by power of the provision of the basic law itself (compare Klein, **Ibid** [16] at p. 276). Against the background of this double purpose the following conclusion arises: the prime minister who resigned and the ministers of his government must act out of awareness of this purpose. On the one hand, they must act with restraint appropriate for the status of an outgoing government. On the other hand they must ensure stability and continuity. The duty of restraint does not exist where there is a vital public need to act. It is self-evident that where such a vital need exists, it must be realized, in appropriate measure. It is a matter, thus, of a flexible approach that balances between restraint and action, according to the circumstances of the case and taking into consideration the changing reality. The question that the principles of reasonableness and proportionality pose is whether the action is ongoing or exceptional. The correct question is, whether in the overall balance – which takes the totality of circumstances into account – restraint or action is required.

10. Every entity operating by the law has a 'range of reasonableness' which reflects the range of legal actions which that entity may undertake. The scope of the range as to the given matter is dependent on the characteristics of the power. Justice Zamir writes:

> 'The question as to whether an administrative decision suffers from extreme lack of reasonableness is dependent on

> the limits of the range of reasonableness, which is the range in which the administrative authority may decide according to its discretion: what is the language and the purpose of the authorizing statute; who is the authorizing entity; what is the matter administered by the authority; whether the authority is operated primarily on the basis of factual findings, on the basis of policy considerations, or on the basis of professional criteria, such as: medical or engineers criteria; and the like. The range of reasonableness changes in accordance with these characteristics: at times it is broad and at times narrow' (HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel and Others* [4] at p. 57).

Justice Or wrote in a similar vein:

> 'The range of reasonableness draws the area in which the authority's decision will be reasonable, in the sense that there are no grounds to intervene in the decision. But the range of deployment of this range is not uniform. It may change in accordance with the circumstances of a given case. It is derived from the quality of the operating values in a given matter.' (HCJ 2534/97, 2535/97, 2541/97 *MK Yahav and Others v. State Attorney and Others* [5] at p. 58).

Against this background the conclusion is to be drawn that as to given matters the range of reasonableness of the prime minister who has resigned and the members of his cabinet is narrower than the range of reasonableness of a prime minister and government who are operating normally. The reason for this is that the prime minister on the one hand and the outgoing government on the other must take into account the special criterion – a criterion that the government normally does not have to take into account – and that is the purpose and the source of its authority. Moreover: the 'range' of reasonableness of such prime minister and government changes as the date of ending the time in office of the elected prime minister nears. Therefore, the 'range' becomes narrower – and the need for restraint and reserve made more necessary – after the elections, and before the elected prime minister begins his term in office, and all subject to vital public needs? Thus, for example, as a rule, it is appropriate in the framework of domestic policy, that the outgoing prime minister and the members of his cabinet not make appointments to senior positions, and leave the work of appointments to the elected prime minister and his government, unless, under the circumstances, the demands of the position create a vital public need to man the position without waiting for the beginning of the term of the elected prime minister, or where it is a matter of a professional appointment when there is not sufficient reason to postpone the appointment. The same is true in the management of foreign policy or defense. No one would think that the outgoing prime minister and his government cannot protect state security from a war that broke out just because the days are the final days of an outgoing government. Defense of the State from war, certainly raises a vital public need, that every

prime minister, including an outgoing prime minister must deal with.

Judicial review

11. What is the scope of the judicial review of the decisions of the resigning prime minister and his ministers? The answer is that such a government does not enjoy a special status as to judicial review. Every government is subject to judicial review, and a prime minister who resigns and the ministers of his government do not have immunity from judicial review. Therefore the court will ask itself – in the framework of the judicial review of the reasonableness of the decision and the proportionality of government decisions – whether the decision of the government is a decision which a reasonable government may make. The court will not ask itself which decision it would have made if it was operating as the government. This criterion also applies, of course, as to the review of the actions of a prime minister who resigned and the ministers of his government. The court will ask himself if the balance the prime minister and his ministers made between the need for restraint and the need for action, is a balance a reasonable outgoing prime minister is permitted to make (compare Burdeau Hamon, Troper *Droit Constitutionnel* [22] at 633-634). The court will not ask itself what the balance is that it would have made were it acting as a prime minister who has resigned.

12. The scope of the judicial review will be influenced by the scope of the administrative power. Although the grounds for review do not change, the scope of the power determines the limits of judicial review. Justice Zamir explained this when he noted:

> 'The essence of administrative power also impacts the scope of judicial review. Indeed, the rules of review do not change from power to power: every power must be used in order to serve the purpose of the law, on the basis of relevant considerations, in a reasonable manner and to the extent necessary, however the content of the rules changes from power to power. And not only do the purpose of the law and relevant considerations change according to the essence of the power, broad or narrow. The essence of the power to manage a prison, because it is so complex, requires the court to act with great care, so that it does not narrow the range of reasonableness of the Prison Services in a manner that will prevent orderly administration of the prison.' (PPA 7440/97 (PPA 6172/97 *State of Israel v. Golan* [6] at p. 8).

If this is the case for the administration of a prison, all the more so as to fundamental questions of policy. Thus, for example, the court will not direct the prime minister and the members of his cabinet whether to undertake a policy of privatization or a policy of nationalization. In the framework of the power of government, it is a matter for the prime minister and his ministers, and not the court, to decide. The Knesset oversees the prime minister and his ministers and review of the policy of a government operating within the range of reasonableness is in the hands of the Knesset. This is so as to a regular prime minister and

government; and it is so as to a prime minister who resigned and the ministers of his government.

From the general to the specific

13. The government is the executive branch of the State (section 1 of the Basic Law: the Government). Based on this power and additional powers given to it (see, for example, sections 40 and 41 of the Basic Law: the Government) it is empowered to administer the foreign and defense policies of the State. The power of the one holding the power (the government) and the essence of the matter (foreign and defense affairs; peace or war) lead to the government having a broad range of reasonableness in these type of matters. Within the bounds of that range the court will not replace its discretion with that of the government. Supervision of the utilization of the powers of the government in these matters is in the hands of the Knesset. Therefore, were these petitions filed prior to the resignation of the Prime Minister, we would more than likely have dismissed them. One government has one policy. Another government another policy. Each is in the hands of the government. The choice between the policy paths is a matter for the government and the supervision of the policy is purely a matter for the Knesset. The choice within the bounds of the range of reasonableness is not to be made by the court. Indeed, in a long line of decisions, we dismissed petitions which dealt with the government's policy for resolving the Israeli-Arab conflict (HCJ 4354/92 *Temple Mount Faithful v. Prime Minister* [7] (negotiation with Syria in the matter of the Golan Heights); HCJ 6057/99 MMT *Mateh Mutkafei Terror v. Prime Minister* [8]; HCJ 7307/98 *Polack v. Government of Israel* [9]; HCJ 2455/94 *'Betzedek' Organization v. Government of Israel* (release of hostages in the framework of a political agreement) [9]; HCJ 4877/93 *Irgun Nifgai Terror v. Government of Israel* [10] (negotiations over the Oslo Accords).

14. Does the conclusion need to be different only because this is an outgoing government? Our answer is in the negative. The choice between the need for restraint (as the petitioners claim) and the need to act (as per the government's stance) is entirely saturated with considerations of security and peace. The Attorney General (in his supplementary response) rightfully noted that:

> 'the negotiators see in it a rare window of opportunity and necessitated by reality at this time. On the other hand, the petitioners raise various concerns lest the negotiation at this time will bring about damage in the future. The arguments come from here and from there, and they are found within the political and parliamentary realm. Determination as to specific arguments, in one direction or another, puts the court in the shoes of those making the political decisions.'

And in the letter of the Attorney General (from December 26, 2000) that was presented before us the Attorney General writes:

> 'I am aware of the risks that you describe in the government, in the case that there is no agreement – risks toward neighboring states Egypt and Jordan – who have

> already made peace, risks toward the total Arab world and the like. These are understood, although there will also be risks if an agreement is obtained which cannot be realized, even if 'fortunate is the man who is anxious always' (Proverbs 28:14 [24]), the question is reward versus loss, and that is the leadership's decision.'

Thus, against the background of these matters, which are brought in the statements of the Attorney General, and according to the material before us, we have not been convinced that in the matter before us negotiation by the outgoing Prime Minister and the members of his cabinet deviates from the range of reasonableness, and that the hand of restraint or of action is supreme. But it is natural that the degree of intervention in a matter such as this will take place in exceptional cases. Beyond this, determination of this question – whose dominant elements are political, and which are found in the center of the social debate in Israel – must take place within the political dialogue in Israel, via the instruments of the Knesset or national vote (HCJ 3125/98 *Abed Elaziz Muhammad Iyad v. IDF commander in Judea and Samaria* [12]. Indeed in comparative literature, where the constitutional custom is occasionally accepted which limits the powers of the outgoing government, the emphasis is placed on political review of decisions of the outgoing government and not judicial review (see Klein, **Ibid** [17] p. 285; Boston and others, **Ibid** [23] p. 641). And note: our approach is not that there is no place for judicial review. Our approach is that in the framework of judicial review, and according to its worldview, it is appropriate in the state of affairs as it is before us, and according to the characteristics of the special questions before us, that the review of the decisions of the outgoing government will take place within the Knesset.

15. It has been argued before us that the Knesset cannot act, and therefore this 'alternate remedy' no longer exists. We cannot accept this position. The 15th Knesset continues to serve. It continues its legislative work. It can continue its review of the actions of the outgoing government. It has the necessary tools in its hands. It has been said to us in this context that a draft Basic Law: the Government (Amendment – Qualification to Signing an Agreement) which has not been advanced in the legislative process has been proposed in the Knesset. It is true, from the moment the Prime Minister announced his resignation the effectiveness of the supervision of his actions is weakened, to the extent it is a matter of the ability to bring about special elections. At the same time, although the Prime Minister is elected in direct elections (section 3(b) of the Basic Law: the Government) the parliamentary principle of supervision of the Prime Minister and the government still stands (see HCJ 6924/00 *Shtenger v. Prime Minister* [13]). Indeed, 'the Knesset is the parliament of the State' (section 1 of the Basic Law: the Knesset) and it is its 'house of legislators' (section 1 of the Transition Law, 5709-1949). Despite the resignation of the Prime Minister the Knesset has broad power to supervise the Prime Minister and his cabinet. This is so according to the existing law, and this is also possible if the existing law is changed – something that is in the establishment and legislative power

of the Knesset. It is found that, it has in its hands, the ability, if it sees fit (and we express no opinion on this), to decide whether the actions of the resigning Prime Minister and the members of his cabinet fit the purpose and the source of power of the outgoing government.

16. Our conclusion is, therefore, that within the bounds of the petitions before us, and in accordance with the totality of the data before us, the review of the balance between the need for restraint and reserve and the need for action is in the hands of the Knesset. This conclusion is based, inter alia, on the declaration of the Attorney General, that if any agreement is signed between the representatives of the outgoing government and the representatives of the Palestinian Authority, it will be established in the agreement itself that a condition for the validity of the agreement in the international arena is that the agreement receive the necessary approvals in accordance with domestic law, including the fact that it will be approved by the government and the Knesset.

The conclusion is that there is no legal basis to grant the petitions therefore they are denied.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice I. Englard

I agree.

Vice-President S. Levin

1. I agree with my hon. colleague that the petitions are to be dismissed, but my path for reaching this conclusion is somewhat different from his.

2. I agree that the outgoing government has not deviated from its formal power in negotiating with the Palestinian Authority and I also agree that it is within the power of the Court in principle to intervene in its action according to the rules of public law; according to these rules the Court may intervene in an act of an outgoing government that deviates significantly and categorically from the accepted area of operation of an outgoing government; indeed the question whether there has been such a deviation may also be subject to debate and on this matter there is a fairly wide range of discretion in which the Court will tend not to intervene. Beyond this range the court may intervene. However, this is not the only factor which may impact the willingness of this court to intervene. Given that the subject of the petition is a matter of sharp public debate, the court may, by power of its discretion, refrain from intervening where the Knesset has the power to explicitly limit the power of the outgoing government to undertake an action which it is not

proper to undertake. From the material before us I have not been convinced that the Knesset does not have the power to intervene. It has even done so in the past; were it not for this consideration I would have had to decide whether we have had placed before us a foundation which justifies the determination that the outgoing government deviated significantly and categorically from the range of activity of an outgoing government. If I had found this to be so and were it not for the consideration which is similar to the quasi existence of an alternate remedy, which has moved me to dismiss the petition, I would make the *orders nisi* absolute; in light of said consideration, which in my view is of determinative weight, it is not necessary for me to express an opinion as to the existence of a factual foundation, as stated.

Justice J. Türkel

1. I agree with the mode of analysis of my hon. colleague President A. Barak. I do not agree with his conclusion: that 'we have not been convinced that in the matter before us negotiation by the outgoing Prime Minister and the members of his cabinet deviates from the range of reasonableness, and that the hand of restraint or of action is supreme'; and that 'within the bounds of the petitions before us, and in accordance with the totality of the data before us, the review of the balance between the need for restraint and reserve and the need for action is in the hands of the Knesset'. Due to the time constraints I will explain my position in a summary of a summary.

2. I am of the opinion, generally, that the range of reasonableness of a prime minister that resigned and the ministers of his government is narrower than the range of reasonableness of a prime minister and ministers who serve regularly. Moreover, this range becomes narrower and narrower – and the duty of restraint applicable to them continues to increase – from day to day and from hour to hour with the approach of the end of the term in office of the prime minister. In this I am going – with a slight change in emphasis – in the path of the President. However, in my opinion, the conclusion is also derived from this that the weight of vital public need which is required according to the approach of the President – to which I also agree– in order to justify action by the resigning prime minister and the ministers of his government during the period of transition also continues to increase. In other words, as the date of the conclusion of the term in office of the resigning prime minister approaches it is no longer sufficient that the public need is merely **vital**, but the public need must be **very vital** in order for it to cancel out the duty of restraint which is imposed on the resigning prime minister and the ministers of his government during the period of transition. It may be possible to also say that as the days go past the 'burden of proof' that the prime minister and the ministers of his government are operating within the range of reasonableness, is transferred to their shoulders. If in the beginning of the term the burden is **on those who are challenging their actions** to show that **there is not a** vital public **need** which justifies doing a specific action, then toward

the end of the period **the prime minister** and the **government** must show that **there is a** very vital public **need** that justifies the action.

3. I have been convinced that political negotiation between the government and the Palestinian Authority **in and of itself** – not to mention agreements and understandings that may be reached during its course – may tie the hands of the prime minister and the next government if another prime minister is chosen. The special elections for prime minister will take place on February 6, 2001; meaning in another 12 days. The question, which is before us for determination is not whether the negotiation that the government is engaged in with the Palestinian Authority – which is undoubtedly fateful as to the future of the State – is within the range of reasonableness. The question is whether **conducting negotiation in the period that is so close to date of the special elections** is within the range of reasonableness. As to this matter we are not required to make any determination as to the contents of the negotiation, the desired political arrangement, considerations of security and peace and the like. In my view, the question that is to be determined is whether there still exists a vital public need – and in my view, whether it is a very vital public need – to conduct the negotiation **in this time period particularly**. The representatives of the government have laid out many and varied reasons as to why the hands of the resigning prime minister and his government ministers are not to be tied, but they have not pointed to a vital public need – and in fact, have not shown any reason – that would justify conducting such an important and fateful negotiation, which in itself may tie the hands of the prime minister that will be elected (if the resigning Prime Minister is not re-elected) and his government ministers. In the absence of such vital public need it is to be determined that continuation of the negotiation in the short time period that is left until the special elections deviates from the range of reasonableness and is to be terminated until the elected prime minister and the ministers of his government start their term in office.

4. Who is meant to hold the sword of review of the policy and the actions of the government?

I also agree that, generally, review of the policy of the government operating within the range of reasonableness and the exercise of its power is placed in the hands of the Knesset. I will add and say that – and this too is in general – it is better for the court to rarely intervene in such matters. However, the matter before us is exceptional and unusual and requires us to move outside the area of the rule.

Indeed, **in theory**, the Knesset has in its hands the legal tools necessary to realize its power of review; however, I have been convinced that **in actuality** this is not the case. As has been clarified it has not been possible for 61 members of the Knesset – despite the fact that they are a majority of the Knesset – to advance the legislation of the Draft Basic Law: the Government (Amendment – Qualification to Signing an Agreement), whose purpose is to prevent the progress of the political negotiation. Without expressing an opinion as to the draft law itself and the question whether it was possible to advance it in the period that

passed since it was submitted, in fact the draft law is 'stuck' in the depths of the Knesset and its committees. Today the Knesset is not capable, for one reason or another, of realizing its power of review.

In this situation and when little time remains, therefore, the sword of review is in the hands of this court alone. It is not entitled to spare itself from the law and withdraw its hands from the decision. It appears that in such a situation the words of our national poet H.N. Bialik are appropriate.

> 'And the hour was the hour of mayhem, of mixing of realms
>
> of ending and beginning, of contradiction and building, of age and youth.
>
> And we the children of the interim, knowingly and unknowingly,
>
> bowed and thanked before both authorities at the same time;
>
> hanging in the balance between these two magnets
>
> all the emotions of our indecipherable hearts then asked the prophet;'
>
> [C.N. Bialik 'To Achad Ha'am']

The hour has come for the Supreme Court to be the 'prophet' and say its word.

5. If my opinion were heard I would grant the petitions in the sense that an order would be given which directs the Prime Minister and the government to refrain from reaching agreements, consents or understandings with the Palestinian Authority, whether in a document or whether by another means, and not to create obligations in any way, in the negotiation currently being conducted, which may tie the hands of the prime minister and the government that will be elected.

Justice I. Zamir

I agree with President Barak that the Basic Law: the Government does not state, neither explicitly nor impliedly, that an outgoing government (which is itself a vague term) is more limited in its powers than a regular government. By law a government is a government, and the law does not create two types of governments, or more. So too, after the prime minister resigns as well. The law grants power to the institution, which is the government, and the change that takes place in the instrument of the institution, which is the prime minister, does not change the powers of the institution itself.

I also agree with President Barak that there is not a constitutional custom in Israel which limits the powers of the outgoing government. A constitutional custom, like any custom, requires proof. No proof has been brought for the existence of such a custom. And the court is not meant to create a custom ex nihilo in a judgment.

Therefore, the question in this case is not a question of power, but a question of discretion. In other words, according to the law the government today has power like the government of yesterday, including the power to conduct political negotiation, but the question is whether the discretion of the government, in conducting such negotiation, was lawfully exercised. Is there a legal defect in the discretion of the government which justifies intervention by the court?

The discretion of the government, like the discretion of every minister in the government and every other authority, is limited and guided by the legal rules, and the court is in charge of the fulfilment of these rules. Inter alia, the government must exercise its powers based on relevant considerations, and not on the basis of foreign considerations, in the framework of the range of reasonableness and in a proportional manner. These rules apply to every government, including an outgoing government, and according to these rules the court is authorized to review decision of every government, including an outgoing government.

These rules do not change from authority to authority or from matter to matter. However the application of the rules may change according to the authority and according to the matter. In accordance with this, the application of the rule of reasonableness, for example, may change when a regular government becomes an outgoing government. In an outgoing government the range of reasonableness may, in certain circumstances, be narrower. As a result, the intervention of the court in the discretion of the outgoing government may be broader. An outgoing government must take into account, daily, that the range of reasonableness which it has in application of its powers may be narrower, and plan its steps accordingly. Thus, for example, in relating to the appointment of public servants to senior positions or in giving benefits that have no other reason except the reason of the upcoming elections. It might be said in the language of President Barak that in certain matters the outgoing government must act with proportional restraint.

This is an important rule. It is innovative, as to date the court has not had the opportunity to state that the range of reasonableness of the

outgoing government can be narrower than the range of reasonableness of a regular government. Time will tell where this rule will lead us.

These petitions do not contain the argument that negotiation by the outgoing government with the Palestinian Authority stems from alien considerations, and even if based on the substance of the matter there is no applicability to the test of proportionality. However, the petitioners claim that in conducting the negotiation the government has crossed the boundary of the range of reasonableness. Based on the claim, conducting the negotiation today, by the outgoing government, a short time before the elections is unreasonable to an extreme degree. Therefore the court is asked to rule that conducting the negotiation, although it was considered lawful by all until a short time ago, has become unlawful after the Prime Minister resigned, and to issue an order which prohibits the government from continuing with the negotiation, or at the very least, to declare that the negotiation is not lawful. Is it proper for the court to prevent the negotiation?

Before the court examines the discretion that the government exercises in conducting negotiation, and determines if it is unreasonable and unlawful, the court must exercise its own discretion, and decide if it is appropriate for the court to intervene in such a matter. As is known, this court has discretion, and it is authorized to summarily dismiss a petition, without discussing it substantively, in accordance with certain rules. Thus, inter alia, the court may and also will, according to its discretion, summarily dismiss a petition because of delay in filing or because an alternate remedy exists. So too, in the case in which the petition raises a matter of a purely political nature, of the type of matters that are entrusted, by law, or by substance, in the hands of the government or the Knesset. This case resembles a case where there is an alternate remedy: there are cases in which the alternate remedy is a suit in another court or appeal to a certain tribunal; and there are cases where the alternate remedy is the handling of the matter under discussion in the government or the Knesset, depending on the substance of the matter. In such matter another entity is considered more appropriate and better suited than the court to handle the matter. Foreign relations of the State are, and have always been, a classic example of such a matter. Thus, as far as is known in every court and every state. In Israel, as well, this court has handed down many decisions in which it summarily dismissed petitions because of the political nature of the petitions, and in all of this, many of the petitions dealt with relations between the State of Israel and the Palestinian Authority. And this is not because the court does not have the authority to intervene in such a matter. It has the authority. But the authority is entails discretion. Indeed, the court can exercise its discretion, in a special case, even to intervene in a purely political matter. But in each case the court must exercise its discretion and decide if it is proper, under the circumstances, to intervene in such a matter. Meaning there are two stops on the pathway of the court, in these petitions as in every other petition: at the first stop it must exercise its discretion and decide if it is proper to intervene in the substance of the petition; at the second stop, it must examine the discretion of the government or of

another authority, according to the issue. The court must pass the first stop, before it reaches the second stop. In these petitions the court still finds itself, in my opinion, at the first stop.

During the course of the proceedings, the court asked the petitioners if they know of another case in any state, at any time, where a court intervened in political negotiation which was being conducted by a government and prohibited it with an injunction from conducting the negotiation or declared that the negotiation is unlawful. The petitioners' response was, that they searched, but did not find. I will risk surmising that they have not found it because it does not exist. As far as is known, there was no such case even in the states where there exists a doctrine which establishes that the outgoing government only has the powers of a maintenance government. And why? Because even in those countries it is accepted that the review of the conduct of negotiation by the outgoing government, even where the claim is made that the negotiation is unjustified and even unreasonable, is in the hands of the elected house, or directly in the hands of the public, and not in the hands of the court. In a democracy the court has a very important role, but a limited role and it is not meant or able to solve every mishap and provide salvation for every crisis.

The petitioners ask that the law come out of Zion. And I respond, not this law, as it is not the law of truth. Generally, the court in Israel, like the court in other countries, does not have the capacity to assess whether this negotiation or another is reasonable or whether is crosses the boundaries of the range of reasonableness, and the court is not allowed to take upon itself the responsibility of granting an injunction proscribing the political negotiation. A court injunction, which proscribes or terminates political negotiation, in itself may be unreasonable or irresponsible.

I do not find it necessary to provide a long explanation as to the significance and ramification of the court's intervention in political negotiation, inter alia, in terms of the status and role of this court in society. Those who need to comprehend, will comprehend. However, in order to explain I will linger briefly on the central claim of the petitioners according to which the very conduct of negotiation by the outgoing government, even without signing an agreement, is unlawful. Why? Because in such negotiation the government presents political positions, such as, willingness to concede on this matter or another, and this can make it more difficult for the next government. However, if this is so, would it be unlawful if the prime minister of the outgoing government publicly declares, without negotiation, for example, during the election campaign, that the government is willing to make certain concessions? Such a declaration, to the whole world, may also make it more difficult for the next government, just like presenting a position in the framework of political negotiation. Is it proper therefore, for the court to issue an order which prohibits the prime minister of the outgoing government from presenting his policy before the broad public? The court too has a range of reasonableness.

In conclusion, these petitions deal with political negotiation, of a

purely political nature, which divides the public in a sharp debate. Whether it is appropriate to conduct such a negotiation or not, and in this matter each person lives by their own beliefs, in any event the government has notified the court that if the negotiation leads to an agreement, it will be explicitly stated in the agreement that it will not be valid unless it is approved by the government, and then is later approved by the Knesset, and will also fulfill all the conditions that were determined for such an agreement in the laws of Israel. In such a case, the government and the Knesset will discuss the agreement substantively and before it is given any validity. Moreover, even at this stage while the negotiation is going on, the Knesset can intervene in the negotiation as it sees fit. That is its power. Therefore, it is also its responsibility. Therefore, this is also the right path to follow. Under such circumstances and taking into account the rest of the circumstances of the case, I believe that no court in the world would take it upon itself to intervene and terminate the negotiation by way of order or declaration. In these circumstances, this court also does not need to do so. Therefore, I agree with President Barak that the petitions are to be denied.

It was decided as per the opinion of President A. Barak, and against the dissenting opinion of Justice J. Türkel.

Petitions denied.

1 Shvat 5761